

State of Colorado



Bill Owens
Governor

John Zakhem
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Meeting Minutes May 16, 2006

The State Personnel Board met in public session on Tuesday, May 16, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:08 a.m. Board Members Diedra Garcia, Don Mares, and John Zakhem were present in person. Board Member Elizabeth Salkind was present via teleconferencing. Board Member Troy Eid was absent.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. May 1, 2006 Report on Residency Waivers

Director Rozansky reported that there were no residency waiver requests this month.

II. PENDING MATTERS

Director Rozansky was recused from participation in the discussion of the next two matters relating to Dan Wells and Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C). Board Counsel directed the discussion, provided the history and current status of the cases, and answered questions from Board members.

A. Cases on Remand

1. Dan Wells and Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C), Court of Appeals case no. 2004CA0086.

Ms. Salkind was recused from participation in the discussion of this matter. Mr. Zakhem moved to enter an order reinstating the Administrative Law Judge's order regarding Rice, adopting the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge, in conformance with the order from the Court of Appeals. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, and Mr. Zakhem.

B. Petitions for Declaratory Order

1. Renewed Petition for Declaratory Order of Barry Rice v. Trustees of the State Colleges in Colorado, Auraria Higher Education, Auraria Media Center, State Personnel Board case number 2006D002.

Ms. Salkind was recused from participation in the discussion of this matter. Noting that a petition for writ of certiorari has recently been denied in this case and an order regarding the Mandate has not yet been issued by the Board and that Complainant could seek redress from the courts for the matters addressed in his petition, Ms. Garcia moved to deny the petition for declaratory order. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, and Mr. Zakhem.

2. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

Mr. Mares and Ms. Salkind were recused from participation in the discussion of this matter. Because there was no quorum for action in this matter, it was tabled until the June Board meeting, although it has been on the Board's Agenda since February 2006.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Patricia Jones v. Department of Corrections, State Personnel Board case number 2003B165.

With regard to Complainant's Motion to Strike Certain Arguments and Attachments in Respondent's Reply Brief or Strike Brief in its Entirety, Ms. Salkind moved to grant Complainant's request to strike Attachment 1, 2003 Layoff Process Audit: Department of Corrections, Final Report, Issued April 2006. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Salkind moved to deny the remaining requests to strike the arguments on Finding #78 and Attachment 4. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Mr. Zakhem moved to deny Complainant's Motion to Allow Sur Reply as untimely, in accordance with Board Rule 8-27B(A). Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem. Respondent's Motion to Strike Complainant's Sur Reply and Accompanying Motions as Untimely was rendered moot by the denial of Complainant's Motion to Allow Sur Reply. Finally, Mr. Mares moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision an order of the Board. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

B. Leo Bellio v. Department of Revenue, Liquor & Tobacco Enforcement Division, State Personnel Board case number 2005B052(C).

Director Rozansky was recused from participation in the discussion of this matter. Board Counsel provided the summary of this matter for Board members. Mr. Mares moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision an order of the Board. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Timothy Kosak v. Department of Transportation, State Personnel Board case number 2005G105.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the

following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- B. Cynthia A. Hernandez v. Department of Revenue, Colorado State Lottery, State Personnel Board case number 2006G047.

Following a discussion of the elements of a *prima facie* case of discrimination, Ms. Garcia moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- C. Ronnie Gail Clay v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2006G046.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Garcia voted in opposition to the motion.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127 (April 7, 2006).

VI. REVIEW OF THE MINUTES FROM THE MARCH 21 AND APRIL 18, 2006 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD

The Board moved by consensus to approve the Minutes of the March 21, 2006 meeting as submitted. The motion passed on the affirmative vote of the following Board members: Mr. Mares, Ms. Salkind, and Mr. Zakhem. Ms. Garcia abstained because she was not present at that meeting.

The Board moved by consensus to approve the Minutes of the April 18, 2006 meeting as submitted. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, and Mr. Zakhem. Mr. Mares abstained because he was not present at that meeting.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS APRIL 18, 2006 PUBLIC MEETING:

- A. Olukemi Olawore v. Department of Human Services, Colorado State Veteran's Home at Fitzsimons, State Personnel Board case number 2006G049.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Dava Portales v. Department of Labor and Employment, Unemployment Insurance Section, State Personnel Board case number 2006G045.

The Board voted to adopt, in part, the Preliminary Recommendation of the Administrative Law Judge, granting the Complainant a hearing on the basis that it appears the appointing authority violated Complainant's rights under § 24-34-401, *et seq.*, C.R.S. The Board declined to adopt the other grounds articulated in the Preliminary Recommendation of the Administrative Law Judge as they are outside the scope of the controlling statute, § 24-50-123(3), C.R.S., for granting a hearing. This does not limit the scope of the issues that may be presented at hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

Jeff Wells, Director of the Department of Personnel and Administration (DPA), reported to the Board on the status of legislation concerning personnel issues. He indicated that the following legislation had passed in the recent legislative session: the elimination of DPA's involvement in whistleblower investigations, subrogation of claims that are not tort claims under the Governmental Immunity Act, change of age from 19 to 25 for dependent eligibility (defining eligibility as living at home or being financially dependent) to make the benefit program consistent for all plans, sanctions for supervisors who fail to do evaluations, and a mileage increase by percentage (2006 - 75% of federal rate, 2008 - 80% of federal rate, after 2008, 90% of federal rate). In addition, \$1.9 million was being added to raising the salary range minimums, in some cases more than 4%. Bills that did not pass included the single-line appropriation measure and allowance for in-grade hires above the minimum range.

Turning next to what he referred to as "a marginally controversial issue," Mr. Wells stated that the DOC Audit report needs clarification. He believes there is a difference of opinion between the ALJs and DPA on whether or not seniority and/or location should be considered in a business decision of a layoff. The primary function of a layoff should be based on business needs for staffing, and, according to Mr. Wells, be the first decision made. In other words, the layoff decision is made as to manpower needs and as to the position, rather than as to the employee. The matrix then takes care of the rest, and seniority is protected by the matrix, as are retention rights. As an example, Mr. Wells told the Board about a situation in which a 9-year employee bumped a 6-year employee, who could have then bumped a 2-year employee. However, the 6-year employee

chose not to bump on the grounds that the 2-year employee was doing an excellent job. Rather, the 6-year employee chose to transfer to another position. Using manpower planning as a business decision, therefore, should be the first step in a layoff. Mr. Wells stated that, in *May v. Department of Human Services*, the Colorado Supreme Court held that an employee's hours and location of work are not protected, and a supervisor can shift persons around, even outside of the layoff process. Jeff Schutt, Dave Kaye, Paul Farley, and Mr. Wells have discussed this issue, and are of the opinion that seniority in and of itself does not have to be the first consideration or determination of layoff. Mr. Zakhem responded that the Board is going to be tackling the layoff chapter of the rules, Chapter 7, for rulemaking, and would like to discuss the forthcoming outline of this chapter with DPA. Mr. Wells said he would be happy to take the Board's recommendations to the Human Resources Directors for feedback.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- DOC Audit Report

B. OTHER BOARD BUSINESS

- Staff Activities

Director Rozansky reported that she and the Administrative Law Judges were drafting a training presentation for Risk Management personnel. ALJ DeForest is to conduct training in Greeley on May 17, 2006, and in Denver on May 25, 2006; Director Rozansky will be conducting training in Grand Junction and Durango on June 15 and 16, 2006; and ALJ McClatchey will be conducting training in Pueblo on June 22, 2006. The Director and ALJs will be conducting training in July 2006 in a session arranged by Brad Mallon of DPA's Division of Human Resources Group.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

Director Rozansky reported that the whistleblower bill regarding investigations by DPA was signed by the Governor. Upon becoming effective, whistleblower cases will no longer be referred to DPA for investigation, but will remain at the Board and proceed to hearing.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the March 21 and April 18, 2006 Executive Sessions
- C. Other Business

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APPROVED THIS 20th DAY OF JUNE, 2006.

John Zakhem, Chair

Diedra Garcia Member

Donald J. Mares

Elizabeth Salkind, Member